

House Engrossed

FILED

**JANICE K. BREWER
SECRETARY OF STATE**

State of Arizona
House of Representatives
Forty-seventh Legislature
Second Regular Session
2006

CHAPTER 141

HOUSE BILL 2715

AN ACT

AMENDING SECTION 34-221, ARIZONA REVISED STATUTES; RELATING TO PUBLIC
CONSTRUCTION CONTRACTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 34-221, Arizona Revised Statutes, is amended to
3 read:

4 34-221. Contract with successful bidder; payments to
5 contractor; security; recovery of damages by
6 contractor for delay; progress payments

7 A. The agent shall enter into a contract with the lowest responsible
8 bidder whose proposal is satisfactory, except that ~~in counties with a~~
9 ~~population of more than one million persons according to the most recent~~
10 ~~United States decennial census~~, in determining the lowest responsible bidder
11 under this section, the board of supervisors may consider, for no more than
12 five projects, the time of completion proposed by the bidder, the value over
13 time of completed services and facilities and the value over time of
14 interrupted services if the board determines that this procedure will serve
15 the public interest by providing a substantial fiscal benefit or that the use
16 of the traditional awarding of contracts is not practicable for meeting
17 desired construction standards or delivery schedules and if the formula for
18 considering the time of completion is specifically stated in the bidding
19 information.

20 B. In determining the lowest responsible bidder for a horizontal
21 construction project using the design-bid-build project delivery method, an
22 agent may consider the time of completion proposed by the bidder if the agent
23 determines that this procedure will serve the public interest by providing a
24 substantial fiscal benefit or that the use of the traditional awarding of
25 contracts is not practicable for meeting desired construction standards or
26 delivery schedules and if the formula for considering the time of completion
27 is specifically stated in the bidding information.

28 C. The terms of a contract entered into pursuant to subsection A shall
29 include the following items:

30 1. A surety company bond or bonds as required under ~~the provisions of~~
31 this article.

32 2. The owner by mutual agreement may make progress payments on
33 contracts of less than ninety days and shall make monthly progress payments
34 on all other contracts as provided for in this paragraph. Payment to the
35 contractor on the basis of a duly certified and approved estimate of the work
36 performed during the preceding calendar month under such contract may include
37 payment for material and equipment, but to insure the proper performance of
38 such contract, the owner shall retain ten per cent of the amount of each
39 estimate until final completion and acceptance of all material, equipment and
40 work covered by the contract. An estimate of the work submitted shall be
41 deemed approved and certified for payment after seven days from the date of
42 submission unless before that time the owner or owner's agent prepares and
43 issues a specific written finding setting forth those items in detail in the
44 estimate of the work that are not approved for payment under the contract.
45 The owner may withhold an amount from the progress payment sufficient to pay

1 the expenses the owner reasonably expects to incur in correcting the
2 deficiency set forth in the written finding. The progress payments shall be
3 paid on or before fourteen days after the estimate of the work is certified
4 and approved. The estimate of the work shall be deemed received by the owner
5 on submission to any person designated by the owner for the submission,
6 review or approval of the estimate of the work.

7 3. When the contract is fifty per cent completed, one-half of the
8 amount retained including any securities substituted under paragraph 5 shall
9 be paid to the contractor upon the contractor's request provided the
10 contractor is making satisfactory progress on the contract and there is no
11 specific cause or claim requiring a greater amount to be retained. After the
12 contract is fifty per cent completed, no more than five per cent of the
13 amount of any subsequent progress payments made under the contract may be
14 retained providing the contractor is making satisfactory progress on the
15 project, except that if at any time the owner determines satisfactory
16 progress is not being made ten per cent retention shall be reinstated for all
17 progress payments made under the contract subsequent to the determination.

18 4. Upon completion and acceptance of each separate building, public
19 work or other division of the contract on which the price is stated
20 separately in the contract, except as qualified in paragraph 5, payment may
21 be made in full, including retained percentages thereon, less authorized
22 deductions. In preparing estimates, the material and equipment delivered on
23 the site to be incorporated in the job shall be taken into consideration in
24 determining the estimated value by the architect or engineer.

25 5. Ten per cent of all estimates shall be retained by the agent as a
26 guarantee for complete performance of the contract, to be paid to the
27 contractor within sixty days after completion or filing notice of completion
28 of the contract. Retention of payments by a purchasing agency longer than
29 sixty days after final completion and acceptance requires a specific written
30 finding by the purchasing agency of the reasons justifying the delay in
31 payment. No purchasing agency may retain any monies after sixty days which
32 are in excess of the amount necessary to pay the expenses the purchasing
33 agency reasonably expects to incur in order to pay or discharge the expenses
34 determined by the purchasing agency in the finding justifying the retention
35 of monies. In lieu of the retention provided in this section, the agent
36 shall, at the option of the contractor, SHALL accept as a substitute an
37 assignment of time certificates of deposit of banks licensed by this state,
38 securities of or guaranteed by the United States of America, securities of
39 this state, securities of counties, municipalities and school districts
40 within this state or shares of savings and loan associations authorized to
41 transact business in this state, in an amount equal to ten per cent of all
42 estimates which shall be retained by the agent as a guarantee for complete
43 performance of the contract. In the event the agent accepts substitute
44 security as described in this paragraph for the ten per cent retention, the
45 contractor shall be entitled to receive all interest or income earned by such

1 security as it accrues and all such security in lieu of retention shall be
2 returned to the contractor by the agent within sixty days after final
3 completion and acceptance of all material, equipment and work covered by the
4 contract if the contractor has furnished the agent satisfactory receipts for
5 all labor and material billed and waivers of liens from any and all persons
6 holding claims against the work. In no event shall the agent accept a time
7 certificate of deposit of a bank or shares of a savings and loan association
8 in lieu of the retention specified unless accompanied by a signed and
9 acknowledged waiver of the bank or savings and loan association of any right
10 or power to setoff against either the agent or the contractor in relationship
11 to the certificates or shares assigned.

12 6. In any instance where the agent has accepted substitute security as
13 provided in paragraph 5, any subcontractor undertaking to perform any part of
14 such public work shall be entitled to provide substitute security to the
15 contractor upon terms and conditions similar to those described in paragraph
16 5, and such security shall be in lieu of any retention under the subcontract.

17 D. No contract for construction may materially alter the rights of any
18 contractor, subcontractor or material supplier to receive prompt and timely
19 payment required to be included in the contract under subsection C.

20 E. The contract shall be signed by the agent and the contractor.

21 F. A contract for the procurement of construction shall include a
22 provision which provides for negotiations between the agent and the
23 contractor for the recovery of damages related to expenses incurred by the
24 contractor for a delay for which the agent is responsible, which is
25 unreasonable under the circumstances and which was not within the
26 contemplation of the parties to the contract. This section shall not be
27 construed to void any provision in the contract which requires notice of
28 delays, provides for arbitration or other procedure for settlement or
29 provides for liquidated damages.

30 G. The contractor shall pay to the contractor's subcontractors or
31 material suppliers and each subcontractor shall pay to the subcontractor's
32 subcontractor or material supplier, within seven days of receipt of each
33 progress payment, unless otherwise agreed in writing by the parties, the
34 respective amounts allowed the contractor or subcontractor on account of the
35 work performed by subordinate subcontractors, to the extent of each such
36 subcontractor's interest therein, except that no contract for construction
37 may materially alter the rights of any contractor, subcontractor or material
38 supplier to receive prompt and timely payment as provided under this
39 section. Such payments to subcontractors or material suppliers shall be
40 based on payments received pursuant to this section. Any diversion by the
41 contractor or subcontractor of payments received for work performed on a
42 contract, or failure to reasonably account for the application or use of such
43 payments, constitutes grounds for disciplinary action by the registrar of
44 contractors. The subcontractor or material supplier shall notify the
45 registrar of contractors and the purchasing agency in writing of any payment

1 less than the amount or percentage approved for the class or item of work as
2 set forth in this section.

3 H. A subcontractor may notify the purchasing agency in writing
4 requesting that the subcontractor be notified by the purchasing agency in
5 writing within five days from payment of each progress payment made to the
6 contractor. The subcontractor's request remains in effect for the duration
7 of the subcontractor's work on the project.

8 I. Nothing in this chapter prevents the contractor or subcontractor,
9 at the time of application and certification to the owner or contractor, from
10 withholding such application and certification to the owner or contractor for
11 payment to the subcontractor or material supplier for unsatisfactory job
12 progress, defective construction work or materials not remedied, disputed
13 work or materials, third party claims filed or reasonable evidence that a
14 claim will be filed, failure of a subcontractor to make timely payments for
15 labor, equipment and materials, damage to the contractor or another
16 subcontractor, reasonable evidence that the subcontract cannot be completed
17 for the unpaid balance of the subcontract sum or a reasonable amount for
18 retention that does not exceed the actual percentage retained by the owner.

19 J. If any payment to a contractor is delayed after the date due
20 interest shall be paid at the rate of one per cent per month or fraction of a
21 month on such unpaid balance as may be due.

22 K. If any periodic or final payment to a subcontractor is delayed by
23 more than seven days after receipt of the periodic or final payment by the
24 contractor or subcontractor, the contractor or subcontractor shall pay a
25 subordinate subcontractor or material supplier interest, beginning on the
26 eighth day, at the rate of one per cent per month or a fraction of a month on
27 such unpaid balance as may be due.

APPROVED BY THE GOVERNOR APRIL 17, 2006.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 17, 2006.